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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Computer III Further Remand Proceedings:	)	CC Docket No. 95-20
Bell Operating Company	)	
Provision of Enhanced Services	)	
	)	
1998 Biennial Regulatory Review --	)	CC Docket No. 98-10
Review of *Computer III* and ONA	)	
Safeguards and Requirements	)	

Comments of Time Warner Communications Holdings Inc.

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Comments of Time Warner Communications Holdings Inc.

Time Warner Communications Holdings Inc. ("TWComm"), by its attorneys, hereby files its comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

SUMMARY

In this proceeding, the Commission is under a legal obligation to reassess the mechanisms designed to prevent BOCs from providing network access to their affiliated information service providers that is technically superior to the access provided to unaffiliated information service providers. The Ninth Circuit held in California III that the Open Network Architecture or "ONA" rules, without fundamental unbundling, are insufficient to protect against discrimination. In the NPRM, the Commission has suggested some factors (CLEC entry, expanded interconnection and competition in the information services

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1 See *Computer III* Further Remand Proceedings; 1998 Biennial Regulatory Review, CC Docket Nos. 95-20, 98-10, *Notice of Proposed Rulemaking* (rel. January 30, 1998) ("NPRM").

industry) that may compensate for the weaknesses in the ONA rules. Unfortunately, none of these suggested factors appears to address the Ninth Circuit's concerns. To avoid further remands, the Commission must demonstrate, with much greater specificity than is contained in the NPRM, that factors other than ONA provide an actual check on the BOCs' and GTE's ability to discriminate. To meet its burden of proof, the Commission must therefore conduct a detailed study of the information services marketplace in this proceeding as well as the effect on discrimination of the full range of regulatory developments (including pending Section 706 petitions).

DISCUSSION

In the NPRM, the Commission seeks comments on a broad range of issues relating to the utility and effectiveness of the cross-subsidy and nondiscrimination protections established in the Computer III proceeding. While the NPRM reflects a sensible inclination to eliminate regulations where they are no longer necessary, the Commission seems to be pursuing this goal at the expense of a thorough and disciplined analysis of the issues raised by the Ninth Circuit in its California III decision.[2] In that decision, the Ninth Circuit held that the Commission had failed to explain why its Computer III rules deterred BOCs from providing unaffiliated information service providers ("ISPs") with technically inferior access to BOC networks or denying

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[2] See California v. FCC, 39 F.3d 919 (9th Cir. 1994) ("California III").

independent ISPs access altogether.[3] In the NPRM, the Commission has again failed to adequately address the Ninth Circuit's concerns.[4]

In the Computer III orders, the Commission replaced its Computer II separate subsidiary regime for protecting independent ISPs from discrimination with the ONA rules.[5] Although the Commission had found in Computer II that only structural safeguards could prevent discriminatory treatment, the Ninth Circuit upheld the Computer III protections against discrimination in California I because the FCC had shown that the new ONA unbundling rules were adequate.[6] As the Ninth Circuit held in California III, however, the FCC subsequently determined that the "fundamental unbundling" originally required by ONA was technically infeasible. In California III, the Ninth Circuit held that the FCC had failed to explain why the Computer III rules adequately protected against discrimination in the absence of "fundamental unbundling."

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3 Since 1994, the Computer III anti-discrimination rules have applied to both the BOCs and GTE. See id. at ¶ 78.

4 These comments address the potential for discrimination where a BOC or GTE is not providing its own information services through a separate subsidiary (either pursuant to Computer II or Section 272 or Section 274). This could be the case, for example, with regard to BOC provision of intraLATA information services.

5 The separate subsidiary protections were also designed to prevent cross-subsidy. The Ninth Circuit overturned only the discrimination safeguards in California III. These comments only address issues related discrimination.

6 See California v. FCC, 905 F.2d 1227, 1232-1233 (9th Cir. 1990) ("California I").

In the instant NPRM, the Commission suggests that the 1996 Act reforms, the implementation of expanded interconnection and competition in the ISP market satisfy the Ninth Circuit's concern that the FCC had not explained why adequate protection against discrimination exists in absence of ONA "fundamental unbundling".[7] But there is no evidence that these factors compensate for the weaknesses in ONA.

In analyzing the effect of each of the factors listed in the NPRM, the Commission must cite to developments that, as a practical matter, prevent discrimination against independent ISPs. In California I, for example, the Ninth Circuit explained that the mere "technical feasibility of bypass" did not constitute an adequate basis for determining that the BOCs' incentive and opportunity to cross-subsidize had been diminished.[8] Thus, in the instant proceeding, it is simply insufficient for the Commission to rely on factors that could constrain the incumbents' behavior in theory only.

The most important factor in the Commission's assessment of the changed circumstances since California III is that the unbundling and interconnection requirements of Section 251(c) are

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7 See NPRM at ¶¶ 29-35.

8 See California I, 905 F.2d at 1235. In the absence of evidence that "bypass has become a realistic option for any appreciable number of ordinary telephone users" or that "the potential for bypass [was] significant enough to reduce the BOCs' ability, as a practical matter, to extract monopoly rents from basic service customers by burdening them with costs from unregulated activities," the Court found no basis for concluding that cross-subsidy would be prevented. See id. (emphasis added).

"essentially equivalent" to the fundamental unbundling the Court in California III found lacking. The Commission acknowledges that the statute only grants "telecommunications carriers" (and not ISPs) the right to such unbundled access. However, the Commission asserts that CLECs (that have the right to unbundled access and interconnection under Section 251) have the incentive to serve "pure ISPs" and that such ISPs could also partner with telecommunications carriers or become telecommunications carriers themselves so that they can take advantage of Section 251.[9]

While theoretically correct, it is not at all clear that these strategies are sustainable as a practical matter. For example, it has become far more difficult for CLECs like TWComm to offer local service to independent ISPs providing Internet access since incumbent LECs across the country have refused to pay reciprocal compensation on local calls terminating at the ISP. Such refusals are blatant violations of the FCC rules. Indeed, every state commission that has considered the issue has found that reciprocal compensation applies to this traffic.[10]

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9 See NPRM at ¶ 33.

10 See, e.g., Petition of MFS Communications Co. for Arbitration of Interconnection Rates, Terms, and Conditions with U S WEST Communications, Inc., Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 et al at 7 (Arizona Corp. Comm. Oct. 29, 1996); Petition of MFS Communications Company for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with U S WEST Communications, Inc., Decision Regarding Petition for Arbitration, Docket No. 96A-287T at 30 (Col. PUC Nov. 5, 1996); Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with U S WEST Communications, Inc., Order Resolving Arbitration Issues, Docket Nos. P-442, 421/M-96-

Notwithstanding these decisions, however, the incumbents have generally been required to hold the compensation money in escrow until final judicial resolution of the issue. Small CLECs often do not have the resources to operate over a long period of time without compensation for traffic imbalances. As a result, the incumbents' resistance tactics have diminished substantially the CLECs' incentive and ability to serve ISPs.[11] Before relying on CLEC entry as a check on BOC discrimination, the Commission must therefore be sure that CLECs are providing an actual, widespread alternative to the incumbent for data transmission to end users.

The BOCs' attempt to preserve their local bottleneck and use such bottleneck to establish their affiliated ISPs as dominant is fully revealed in their Section 706 petitions.[12] In those

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855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 at 75-76 (Minn. PUC Dec. 2, 1996); Petition of MFS Communications Company for Arbitration of Interconnection Rates, Terms and Conditions, Commission Decision, Order No. 96-324 at 13 (Ore. PUC Dec. 9, 1996); Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company and U S WEST Communications, Inc., Arbitrator's Report and Decision, Docket No. UT-96-0323 at 26 (Wash. Utils. and Transp. Comm. Nov. 8, 1996) aff'd. U S WEST Communications Inc. v. MFS Intelenet, Inc., No. C97-222WD (Order issued Jan. 12, 1998); Petition of Cox Telecom Inc., Order, Case No. 970069 (Va. State Comm. Oct. 24, 1997); Petition of SNET, Order, No. 97-05-22 (Conn. Dep't of Pub. Util. Control Sept. 1997); Application for Approval of an Interconnection Agreement Between Brooks Fiber Communications of Michigan and Ameritech Information Industry Services on Behalf of Ameritech Michigan, Case No. U-11178 (Jan. 28, 1998).

11 No doubt, ISPs attempting to take advantage of Section 251 by becoming telecommunications carriers themselves (or establishing an affiliate as a telecommunications carrier) would face similar kinds of resistance tactics from the BOCs.

12 See Bell Atlantic's Petition for Relief From Barriers to Deployment of Advanced Telecommunications Services, CC

petitions, the BOCs have asked to be relieved of the obligation to unbundle or offer on a wholesale basis high-speed data services that ISPs need in order to compete. Furthermore, Bell Atlantic has asked that it be freed to provide interLATA high-speed data services "outside otherwise-applicable price-cap and separate affiliates rules."[13] Ameritech has sought similar relief in its petition.[14] But such relief would make it very unlikely that CLECs could offer ISPs a significant alternative to data transmission services offered by the BOCs.

In fact, the deregulatory proposals suggested in the NPRM, especially when combined with the relief sought in the Section 706 petitions, would leave the BOCs with the incentive and opportunity to discriminate in favor of their own information service offerings. The BOC information service content offerings would therefore enjoy benefits over competitive information services that would have nothing to do with the underlying quality of the services themselves. This is exactly the result that the Computer III rules were designed to prevent.

Moreover, the other factors offered in the NPRM as possible bases for relying on ONA (absent "fundamental unbundling") as an adequate discrimination protection are unconvincing. The

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Docket No. 98-11; Ameritech Petition to Remove Barriers to Investment in Advanced Telecommunications Services, CC Docket No. 98-32; U S WEST Petition to Remove Barriers to Investment in Advanced Telecommunications Services, CC Docket No. 98-26.

13 See Petition of Bell Atlantic at 4.

14 See Petition of Ameritech at n.4, 12-14.

Commission refers to the implementation of its expanded interconnection regime, under which ISPs may interconnect transport facilities with incumbent LECs. But the Commission's collocation rules predate California III. If they were not adequate then to prevent discrimination, it is hard to see how they would do so now.[15]

Similarly, it is hard to see how the third factor suggested by the Commission, the competitive nature of the ISP market, satisfies the concerns expressed by the Ninth Circuit in California III. As the Commission acknowledges in the NPRM, the Ninth Circuit has known since California I, that "powerful competitors such as IBM, which have the resources and expertise to monitor the quality of access to the network" provide information services. Yet notwithstanding the presence of these powerful ISP competitors at the time of California III, the Ninth Circuit still found the Commission's protections against discrimination inadequate. There is no reason to think that the analysis would be any different today.

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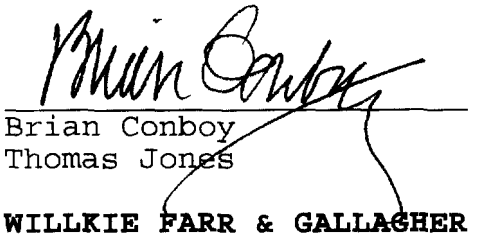
15 It is true that the physical collocation rules were overturned in the same year (1994) as the California III decision. California III was argued on April 11, 1994 and the physical collocation rules were vacated on June 10th. See Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) (overturning FCC's physical collocation rules). On July 25, 1994 the FCC released virtual collocation rules to replace its overturned physical collocation rules. See Virtual Interconnection with Local Telephone Company Facilities, 9 FCC Rcd 5154 (1994). But California III was not decided until October 18, 1994. Thus, the Ninth Circuit (if informed at all on the issue) would have known that the virtual collocation rules were in place when it issued its California III decision.

In sum, the Commission has failed to point to any development since California III that, as a practical matter, diminishes the BOCs' and GTE's incentive and ability to discriminate against independent ISPs. In California III, the Ninth Circuit held that ONA, in its current form, is not enough by itself to prevent discrimination. Thus, in this proceeding, the Commission must study in detail all of the factors that could play the role initially intended for fundamental unbundling. Absent a finding that such additional protections have been shown to be effective throughout the regions served by the BOCs and GTE, the Commission simply does not have the authority to rely on ONA, without fundamental unbundling, as an adequate protection against discrimination.

CONCLUSION

In the NPRM, the Commission has failed to show that any change since the Ninth Circuit's decision in California III adequately addresses the potential for the BOCs and GTE to discriminate against independent ISPs. This shortcoming illustrates the urgent need for the Commission to study closely the actual competitive conditions in the ISP market.

Respectfully submitted,



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